for herself a permanent matrimonial home in Singapore. In any event the truth of the matter here is that the defendant was away in England when the plaintiff purchased the house and it is not disputed that they never lived there together as husband and wife nor did she contribute any part of her earnings to its upkeep or maintenance.

The plaintiff in his examination-in-chief says:

"I did not intend to give my wife a half share in the house. I put her name in because she happened to be my wife. At that particular time she was already in England. She left for the first time in July 1975. Between 1975 and 1978 she gave me the impression that she would return and stay with me in Singapore. The purchase of the flat was wholly financed by the Government through the POSB. They gave me the full purchase price. Repayments were from my salary. Defendant made no contribution towards the purchase of the property."

Again under cross-examination he says:

"I never intended my wife to get any share in this property. The reason why I included her name was to induce her to come back. I had not thought of any other way. This is not an after thought.

Put: If you had sought professional advice you could have excluded your wife – I agree."

I accept the evidence of the plaintiff for in the circumstances of this case his evidence rings true as indeed that of the defendant rings false on the salient points.

Counsel for the defendant cited a number of cases in support of her claim. They are in my view cases related to matters pertinent to matrimonial homes as matrimonial assets. This is not the position in the instant case for the property here was never used as the matrimonial home of the parties since the time of its purchase in 1975.

There will therefore be judgment for the plaintiff with costs and a declaration and order as prayed for by him. Counterclaim of the defendant is dismissed with costs.

Claim allowed.

Solicitors: *Yap & Yap; Y.M. Jumabhoy & Co.*

PUBLIC PROSECUTOR v. PHUA KENG TONG

PUBLIC PROSECUTOR v. FREDERICK TAN IM KIAN

FEDERICK TAN IM KIAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Thean J.) February 5, 1986]

[Singapore – Magistrate's Appeal Nos. 178, 179 & 181 of 1984]

Official Secrets – Unauthorized communications and receipt of classified documents – Whether s. 5(1) of Official Secrets Act ultra vires art. 14(1) of Constitution – Whether mens rea a necessary ingredient of offence – Whether offences proved – Adequacy of sentence – Official Secrets Act (Cap. 233), ss. 5(1) (e) (f), 5(2), 12 & 17(2) – Singapore Constitution, art. 14.

Constitutional Law – Meaning of "security" – Whether Official Secrets Act (Cap. 233), s. 5(1) contravenes Singapore Constitution, art. 14.

These three appeals arose out of a joint trial of three charges, in respect of Frederick Tan Im Kian ("Tan"), under section 5(1) (e) (f) of the Official Secrets Act for communication certain confidential documents to Phua Keng Tong ("Phua"), and, in respect of Phua, under section 5(2) of the Act for receipt of certain confidential document. Tan at all material times was the Director of Protocol and Consular Division, Ministry of Foreign Affairs. Phua, a close friend of Tan, was the financial manager of Philips (Singapore) Pte. Ltd. The learned Senior District Judge convicted Tan on all the three charges and sentenced him to one day's imprisonment and to pay a fine of $750 on each charge, the sentence of imprisonment to run concurrently. Phua was acquitted and discharged. The Public Prosecutor appealed against the acquittal of Phua and against the sentences on Tan, who in turn appealed against convictions and sentences.

Held: (1) section 5(1) of the Act falls within the ambit of Article 14(2)(a) of the Constitution of Singapore and is therefore not *ultra vires* Article 14(1) of the Constitution;

(2) *mens rea* is a necessary ingredient of the offence which the prosecution must prove. The prosecution has proved the ingredients of the offences with which Tan was charged, and his convictions must stand. Considering all the relevant facts, the learned Judge is not disposed to disturb the nominal terms of one day's imprisonment. The fine of $750, however, is manifestly inadequate and is increased to $1,500 for each of the charges and, in default, one month's imprisonment;

(3) the ingredients of the charge have been proved against Phua. The acquittal is set aside, and Phua is convicted of the charge. He is fined $1,500, and, in default, one month's imprisonment.

Cases referred to:

(1) *Rex* v. *Crisp and Homewood* (1919) 83 J.P. 121.
(2) *R.* v. *Fell* (1963) Crim. L.R. 207.
(3) *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918, 921.
(4) *Lim Chin Aik* v. *The Queen* [1963] A.C. 160; [1963] M.L.J. 50.
(5) *Sweet* v. *Parsley* [1970] A.C. 132.

(6) *Gammon Ltd.* v. *Attorney General of Hong Kong* [1985] 1 A.C. 1.
(7) *London Computator, Ltd.* v. *Seymour* [1944] 2 All E.R. 11, 12.
(8) *Taylor's Central Garages (Exeter) Ltd.* v. *Roper* (1951) 115 J.P. 445, 449, 450.
(9) *R.* v. *Banks* [1916] 2 K.B. 621, 622.
(10) *R.C.A. Corporation* v. *Custom Cleared Sales Pty. Ltd.* [1978] F.S.R. 576; 19 A.L.R. 123.

MAGISTRATE'S APPEAL.

Roy Neighbour (Deputy Public Prosecutor) for Public Prosecutor.

H. E. Cashin for Frederick Tan Im Kian.

Phua Keng Tong in person.

Cur. Adv. Vult.

Thean J.: There are three appeals before me and they arose out of a joint trial of three charges against Frederick Tan Im Kian ("Tan") and one charge against Phua Keng Tong ("Phua") before the learned Senior District Judge in the Subordinate Courts. The three charges against Tan read as follows:

Charge in DAC 5307/83

"You, Frederick Tan Im Kian, are charged that you, between the 31st day of October, 1983 and the 11th day of November, 1983 at the Ministry of Foreign Affairs, City Hall, Singapore, having in your possession a document, namely, Ministry of Foreign Affairs Information Note No. 133/83, which you had obtained owing to your position as the Director of the Protocol and Consular Division of the said Ministry, did communicate the said document to one Phua Keng Tong, an unauthorised person, and you have thereby committed an offence under Section 5(1) (e) (f) of the Official Secrets Act (Chapter 233) and punishable under Section 17(2) of the said Act."

Charge in DAC 5305/83

"You, Frederick Tan Im Kian, are charged that you, between the 8th day of November, 1983 and the 11th day of November, 1983 at the Ministry of Foreign Affairs, City Hall, Singapore, having in your possession a document, namely, Notes of Meeting between Dr Tony Tan Keng Yam, Minister for Trade and Industry and Mr Paul Volcker, Chairman, Federal Reserve Board, in Mr Paul Volcker's office, on Wednesday, September 28, 1983 at 3.00 pm, which you had obtained owing to your position as the Director of the Protocol and Consular Division of the said Ministry, did attempt to communicate the said document to one Phua Keng Tong, an unauthorised person, and you have thereby committed an offence under Section 5(1) (e) (f) of the Official Secrets Act (Chapter 233) read with Section 12 of the said Act and punishable under Section 17(2) of the said Act."

Charge in DAC 5306/83

"You, Frederick Tan Im Kian, are charged that you, between the 8th day of November, 1983 and the 11th day of November, 1983 at the Ministry of Foreign Affairs, City Hall, Singapore, having in your possession a document, namely, Notes of Meeting between Dr Tony Tan Keng Yam, Minister for Trade and Industry and Mr Malcolm Baldrige, US Secretary of Commerce, in Mr Baldrige's office, on Thursday, Septemebr 29, 1983 at 3.15 p.m., which you had obtained owing to your position as the Director of the Protocol and Consular Division of the said Ministry, did attempt to communicate the said document to one Phua Keng Tong, an unauthorised person, and you have thereby committed an offence under Section 5(1) (e) (f) of the Official Secrets Act (Chapter 233) read with Section 12 of the said Act and punishable under Section 17(2) of the said Act."

The charge against Phua is as follows:

Charge in DAC 5304/83

"You, Phua Keng Tong, are charged that you between the 31st day of October, 1983 and the 11th day of November 1983 at 42 Thomson Hills Drive, Singapore, did receive a document, namely Ministry of Foreign Affairs Information Note No. 133/83 from one Frederick Tan Im Kian knowing at the time when you received it that the said document was communicated to you in contravention of the Official Secrets Act (Chapter 233) and you have thereby committed an offence under Section 5(2) of the said Act and punishable under Section 17(2) of the said Act."

Prior to the prosecution Tan was at all material times the Director of Protocol and Consular Division, Ministry of Foreign Affairs, and in that capacity received documents from Ministries generally, and most of the documents he received were classified. Tan is a close friend of Phua; they have known each other for many years. Phua was the financial manager of Philips (Singapore) Pte. Ltd., a position which he had held since 1976. He joined the company in March 1973 as a group financial executive and became a financial manager in 1976. Part of his work as a financial manager involved dealing in foreign currencies. He had kept himself well-informed on financial matters and world events which would have an effect on movements of currencies, particularly the major currencies such as U.S. dollar, Japanese yen, pound sterling and deutschmark.

Sometime in the middle of 1981, Phua started foreign currency speculations on his own and the currencies he dealt in were U.S. dollar, Japanese yen, deutschmark, sterling pound and Hong Kong dollar. On July 26, 1983, he purchased 2 million Hong Kong dollars on his own assessment of the situation. After his purchase he had a telephone conversation with Tan on July 27, 1983, in the course of which he enquired of the situation then prevailing in Hong Kong. In response Tan gave

certain information to Phua which appeared to the latter to be favourable to his transaction on Hong Kong dollars. He asked Tan to verify the information and a subsequent telephone conversation on the same day ensued – which in fact was a follow-up of what they had previously discussed. In that second telephone conversation Phua persuaded Tan to participate in a purchase of Hong Kong dollars to which the latter imprudently succumbed. Phua then purchased in his name two further lots of Hong Kong dollar, each for an amount of HK$2 million: one for himself and one for Tan. Soon after that purchase, the Hong Kong dollars took a deep plunge in the foreign exchange market. Naturally both of them became extremely concerned with the fate of Hong Kong dollars, and presumably after a series of agonizing reappraisals of the situation decided to sell their Hong Kong dollars, which they ultimately did in September 1983, sustaining a huge loss of S$228,768.22 of which Tan's share amounted to S$80,000. Tan was very upset but was advised by Phua not to feel depressed as one could make up the loss through other transactions, and in that connection Phua mentioned two events in the ensuing twelve months on which they should focus their attention: (i) the result of Tanaka's trial in Tokyo and (ii) President Reagan's re-election, both of which would have an effect on the movements of currencies in the foreign exchange market.

Phua left for Europe in early October 1983 and did not return until near the end of that month or thereabout. During the period between October 27 and November 8, 1983 Tan, in his official position, received the following documents, namely:

(a) Information Note No. 133/83 ("Information Note") entitled "The impact of Tanaka's conviction on Nakasone and the LDP";

(b) Notes of Meeting between Dr. Tony Tan Keng Yam, Minister for Trade and Industry, and Dr. Paul Volcker, Chairman, Federal Reserve Board, in Dr. Volcker's office in Washington D.C. on Wednesday, September 28, 1983;

(c) Notes of Meeting between Dr. Tony Tan Keng Yam, Minister for Trade and Industry, and Mr. Malcolm Baldridge, United States Secretary of Commerce, in Mr. Baldridge's office in Washington D.C. on Thursday, September 29, 1983.

The first document, Information Note, was prepared by one Bernard William Baker (PW10), the Foreign Service Officer (covering Japan/South Korea desk), Political Division, Ministry of Foreign Affairs, and it was marked or stamped "Confidential" and was meant to keep the Singapore's missions and other authorised persons informed of the specific occurrence at that time. It was prepared following the conviction in Tokyo, two weeks earlier, of the former Japanese Prime Minister, Mr. Kakuei Tanaka, by a District Court in Tokyo, on charges of corruption. The Information Note was sent to the Registry in the Ministry of Foreign Affairs on October 27, 1983 for copies to be made which were thereafter to be sent only to persons whose designations appeared in "List B to D of the Distribution List" (exhibit P29) and Tan was one of such persons in the List C. Tan received a copy of the Information Note and after perusal he requested his personal assistant (PW5) on October 31, 1983 to make a photocopy of the Information Note; thereafter he sent the copy (exhibit P9) to Phua together with a cutting of an article which appeared in the *Straits Times* of October 3, 1983 entitled "Should Tanaka be found guilty ... Verdict of Lockheed scandal has many political implications" (exhibit D3). Accompanying the news cutting and P9 was a brief note written by Tan: "From your Partner in sorrow. Frederick" or words to that effect.

The second and third documents, being notes of the meetings which Dr. Tony Tan had with Dr. Paul Volcker and Mr Malcolm Baldrige respectively in Washington D.C., were prepared by Tan Jee Say (PW11), the Deputy Director with the Ministry for Trade and Industry, who was present at the two meetings and were prepared soon after his return to Singapore. On November 3, 1983, he sent copies of the notes with several others to Tan for onward transmission to the Singapore's missions in London and Washington D.C. and they were sent with a covering minute (exhibit P28). Both the notes of the meetings were not marked or classified "Confidential" due to an oversight on the part of PW11 which he admitted. Tan received the notes on November 8, 1983 and after perusal thereof had a copy of each made and posted the two copies (exhibits P11 and P12) to Phua after writing on the reverse of P12: "Phua, I thought this would be useful for you. Fred".

Both Tan and Phua were arrested by officers of the Internal Security Department ("ISD") on November 11, 1983. At the time of the arrest of Phua at his home, the officers found exhibit P9 (the copy of the Information Note) on a table in the dining hall, and Phua admitted that that copy was sent to him by Tan. The officers recovered

from the letter box an envelope containing exhibits P11 and P12. Both Tan and Phua were charged subsequently and were tried together. At the conclusion of the trial the learned Senior District Judge convicted Tan on all the three charges and sentenced him to serve 1 day's imprisonment and to pay a fine of $750 on each of the 3 charges, the sentence of imprisonment to run concurrently; he acquitted and discharged Phua on the charge against him. The Public Prosecutor appeals against the acquittal of Phua and against the sentences on Tan; Tan appeals against the convictions and sentences.

Taking the appeals in their logical order, I propose to deal with first the appeal by Tan which is principally against the convictions. Mr. Cashin on behalf of Tan argued that the provisions of section 5(1) of the Official Secrets Act (Cap. 233) ("the Act") are extremely wide and as a matter of construction, the words "secret official" in subsection (1) thereof qualify only "code word, countersign or password" and do not qualify "photograph, drawing, plan, model, article, note, document or information", and the latter words are catch-all provision intended to cover all varieties of document or information. The provisions of section 5(1) so far as material are as follows:

"5.-(1) If any person having in his possession or control any secret official code word, countersign or password, or any photograph, drawing, plan, model, article, note, document or information which –

(a) .... ;

(b) .... ;

(c) ....;

(d) .... ;

(e) he has obtained, or to which he has had access, owing to his position as a person who holds or has held office under the Government, or as a person who holds, or has held a contract made on behalf of the Government, or as a person who is or has been employed under a person who holds or has held such an office or contract,

does any of the following, that is to say –

(f) communicates directly or indirectly any such information or thing as aforesaid to any foreign power other than a foreign power to whom he is duly authorised to communicate it, or to any person other than a person to whom he is authorised to communicate it or to whom it is his duty to communicate it;

(g) .... ;

(h) .... ;

(i) .... ,

that person shall be guilty of an offence under this Act".

I agree with Mr. Cashin that the words, "secret official", qualify only "code word, countersign or password" and not "any photograph, drawing, plan, model, article, note, document or information" ("catch-all words"). There is really no dispute on this point. Mr. Roy Neighbour for the Public Prosecutor accepted this construction. But the catch-all words are qualified by paragraphs (a), (b), (c), (d) and (e) of section 5(1). In this particular case the catch-all words are qualified by paragraph (e).

Mr. Cashin then contended that the catch-all words in section 5(1), and particularly the words, "document or information" being so wide and unrestricted, contravene Article 14 of the Singapore Constitution. Article 14 provides:

"(1) Subject to clauses (2) and (3) –

(a) every citizen of Singapore has the right to freedom of speech and expression;

(b) all citizens of Singapore have the right to assemble peaceably and without arms; and

(c) all citizens of Singapore have the right to form associations.

(2) Parliament may by law impose –

(a) on the rights conferred by paragraph (a) of clause (1), such restrictions as it deems necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation, or incitement to any offence;

(b) on the right conferred by paragraph (b) of clause (1), such restrictions as it deems necessary or expedient in the interest of the security of Singapore or any part thereof or public order; and

(c) on the right conferred by paragraph (c) of clause (1), such restrictions as it deems necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality.

(3) Restrictions on the right to form associations conferred by paragraph (c) of clause (1) may also be imposed by any law relating to labour or education".

The learned judge held that the prohibition of unauthorised communication of government documents or information had nothing to do with "the right to freedom of speech and expression" and in particular, he said:

"On the issue of the constitutionality of section 5(1), I was of the view that that provision is not *ultra vires* Article 14 of the Constitution of Singapore, since the prohibition of the unauthorised communication of government documents

or information has nothing to do with the "right to freedom of speech and expression". This prohibition must surely be viewed as being designed to ensure "public order" and good Government."

Mr. Cashin submitted that on this point the learned judge erred in law. Section 5(1) of the Act, he said, has nothing to do with "public order". Falling within the ambit of "public order" are legislation dealing with unlawful assembly, rioting and promoting enmity between different sections of the community. In support he relied on pages 121-122 of Volume C of *Basu's* Commentary on the Constitution of India (6th edn.), where the learned author expressed the view that read in the light of various Indian decisions the term "public order" would be synonymous with "public safety and tranquillity". The concept of "good government" relied upon by the learned judge, Mr. Cashin said, is also untenable, as "good government" is not one of the matters listed in Article 14(2) of the Constitution; the list stated in Article 14(2) is exhaustive and the provisions thereof are to be strictly construed. Thus far I agree with Mr. Cashin. In my opinion there is no doubt that the right to freedom of expression includes communication or dissemination of information. There is also no doubt that section 5(1) of the Act does impinge on such right, and the question is whether section 5(1) of the Act or any part thereof falls within the ambit of clause (2) of Article 14; clause (3) thereof is not relevant to the present proceedings. It seems to me that the Act is a piece of legislation enacted in the interest of the security of Singapore; and that is a matter expressly listed in Article 14(2). The word "security" in the context of Article 14(2) does not mean merely protection from danger. It includes protection of information which the Government considers vital or essential for its administration. I am reinforced in my view by the following passage from Volume C of *Basu's* Commentary on the Constitution of India (6th edn.) at page 115:

"Maintenance of 'official secrets' is also essential for the security of the State, and may, therefore, be a valid ground for restricting the freedom of communication."

In my judgment section 5(1) of the Act falls within the ambit of Article 14(2) (a) of the Constitution of Singapore and is therefore not *ultra vires* Article 14(1) of the Constitution.

I now turn to consider the next argument of Mr. Cashin, namely: *mens rea* is an essential ingredient of an offence under section 5(1) of the Act. The learned judge held that the offence is an absolute one and no *mens rea* is necessary. Such a conclusion is not entirely without support. In the case of *Rex* v. *Crisp and Homewood*[1] the first accused at the material time was in the employment of the War Office as a clerk and in that official position had obtained information relating to certain contracts which he communicated to the second accused. The first accused was charged with an offence under section 2(1) of the Official Secrets Act, 1911 of the United Kingdom, the relevant parts of which are *in pari materia* with section 5(1)(e) and (f) of the Act. Avory, J. in holding that the accused had committed the offence said, at p. 122:

"In my opinion there is evidence in this case that the defendant Crisp, having in his possession information which he had obtained owing to his position as a person who held office under his Majesty, communicated that information to a person other than a person to whom he was authorised to communicate it. If there is evidence that he did that, that brings him within the words of section 2 of this statute."

In that case, however, the question of *mens rea* was not raised and argued. In *R.* v. *Fell*[2] where the accused pleaded guilty to eight charges for unlawfully communicating documents under section 2(1) of the Official Secrets Act, 1911, the Court of Criminal Appeal in England in dismissing the application for a reduction of sentence held, *obiter*, that the offence under that section is an absolute one and is committed whatever the document contains and whatever the motive for disclosure is and whether or not the disclosure is prejudicial to the state.

The issue of *mens rea* really turns on the true construction of the section 5(1) of the Act, and the rule of construction is that where a statutory provision creates an offence there is a presumption that *mens rea* is a constituent of such an offence unless it is displaced expressly or by necessary implication by the language of the statute or by the subject matter with which the statute deals. In *Sherras* v. *De Rutzen*[3] Wright J. said:

"There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

This pronouncement was approved and adopted by the Privy Council in *Lim Chin Aik* v. *The Queen.*[4] In that case the accused (who had entered Singapore) was charged with and convicted of the offence

of contravening section 6(2) of the Immigration Ordinance, 1952 by remaining in Singapore after he had been declared a prohibited immigrant. At the trial there was no evidence that the order declaring him a prohibited immigrant had come to his notice, and the Privy Council held that a guilty intent was an essential ingredient of the offence and there was no guilty intent on his part, as he was at the material time unaware of the order. The conviction was quashed. The same view was expressed by the House of Lords in *Sweet* v. *Parsley*.[5] There the accused who was a tenant of a farmhouse let out several rooms to various tenants. She was charged and convicted with being concerned in the management of the house used for the purpose of smoking cannabis resin contrary to section 5 of the Dangerous Drug Act, 1965. It was conceded that she did not know that the house was so used. The House of Lords held that section 5 did not create an absolute offence and *mens rea* was an essential ingredient of the offence; the conviction was accordingly quashed. Lord Morris of Borth-y-Gest expressed a very emphatic view on the point right at the commencement of his speech at p. 152, where he said:

"My Lords, it has frequently been affirmed and should unhesitatingly be recognised that it is a cardinal principle of our law that *mens rea*, an evil intention or a knowledge of the wrongfulness of the act, is in all ordinary cases an essential ingredient of guilt of a criminal offence. It follows from this that there will not be guilt of an offence created by statute unless there is *mens rea* or unless Parliament has by the statute enacted that guilt may be established in cases where there is no *mens rea*."

More recently the same point came up for consideration before the Privy Council in the case of *Gammon Limited* v. *Attorney General of Hong Kong*[6] and there it was held that *mens rea* was to a certain extent not an essential ingredient of the offences under section 40(2A) and (2B) of the Building Ordinance of Hong Kong. In delivering the judgment of the Board, Lord Scarman stated the law in the following propositions, at p. 14:

"(1) there is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is "truly criminal" in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."

I now turn to consider the Act and in particular section 5(1) thereof. The subject matter of the Act is the prevention or prohibition of disclosure of official documents and information; it is not one dealing with an issue of social concern, such as public safety or public welfare, and there does not appear any indication that the presumption of *mens rea* should be displaced. Looking at the section itself, the language is silent as to the requirement of *mens rea*. There is, therefore, nothing either in the subject matter or the language of the Act which necessarily displaces the presumption that *mens rea* is a necessary ingredient of an offence under section 5(1). In my judgment, on the basis of the principles laid down in those cases, *mens rea* is a necessary ingredient of the offence which the prosecution must prove. Mr. Neighbour on being referred to these authorities has conceded this.

The question then is what is the *mens rea* in this case; the term *per se* is imprecise. Mr. Cashin argued that the *mens rea* here is the intention to prejudice the State in some way and that Tan in sending the documents to Phua did not have that intention at all and did not in any way prejudice the State. I am unable to accept this view. In my opinion, for the purpose of an offence under section 5(1)(e) and (f), *i.e.* the offence with which Tan was charged, the *mens rea* is a knowledge of the wrongfulness in committing the act complained of. The question really is whether Tan communicated P9 and attempted to communicate P11 and P12 to Phua in the knowledge that it was wrong to do so. That of course must turn on the evidence before the learned judge, which, so far as material, is this. Tan had been in the Government service since 1966 and at the material time was occupying a senior position in the Ministry of Foreign Affairs; he was a superscale officer. He had signed undertakings to safeguard official information on no less than three occasions; the last occasion was as recent as on December 4, 1980. Tan knew that he received the documents in question in his official position in the Ministry of Foreign Affairs; he knew to whom these documents were authorised to be sent and he knew that Phua was not one of such persons. He deliberately caused copies of these documents to be made and he deliberately sent the copies to Phua, though he did it openly. He admitted in evidence that sending P9 to Phua was in contravention of the Distribution List and that sending of P11 and P12 to Phua was contrary to the minute in P28. The documents were sent to Phua on personal and private basis and not for any official purpose or in connection with any official

business. There was no question of any mistake on his part. Surely in these circumstances he must have known that documents could not be sent to an unauthorised person such as Phua and that it was wrong for him to do so. In his defence Tan said that in his official capacity it was a common practice when posted abroad to do "trading" of documents which do not affect the security of the State, and that similarly in the position he then held he would have to evaluate documents or information which he could provide to the press. Neither of these situations is relevant here and neither of them is in any way comparable to what had happened in this case. In my judgment, the prosecution has proved the ingredients of the offences with which Tan was charged, namely:-

(a) that the documents in question, P9, P11 and P12, are documents in Tan's possession or custody which Tan had obtained or to which he had had access, owing to his position as a person who held the office under the Government;

(b) that he communicated P9 and attempted to communicate P11 and P12 to Phua, a person to whom he was not authorised to communicate or to whom it was not his duty to communicate, and

(c) that he communicated P9 to Phua and attempted to communicate P11 and P12 to Phua intentionally in the knowledge that it was wrong to do so.

The convictions of Tan therefore must stand.

I now turn to consider the appeal by the Public Prosecutor against the sentences passed on Tan, Mr. Neighbour contended that the sentences were manifestly inadequate and did not reflect the seriousness of the charges; he therefore urged that the sentences should be enhanced. That an offence under the Official Secrets Act is a serious offence and should not be viewed with leniency, I agree. That a sentence should adequately reflect the seriousness of an offence I also agree; but that must be viewed in the context of the circumstances. I should add that this Court would have no hesitation in imposing a custodial sentence of some length, and indeed even the maximum custodial sentence, where the circumstances warrant such a sentence. In this case there are two components to the sentence imposed on each of the charges: a nominal imprisonment of one day and a fine of $750. I do not agree with Mr. Neighbour that the learned judge did not give any reason why a custodial sentence of some length was not deserving in this case. I think he did. He took into consideration all the relevant circumstances and came to the conclusion that in this case the appropriate custodial sentence be a nominal one. In addition, I should mention that Tan sent the documents in question to Phua for the latter's information and not pursuant to any agreed plan made between them or any conspiracy whereby Tan was to feed Phua with any documents or information. At the time he sent the documents, particularly exhibit P9, he was not sure that Phua, who had left for Europe, had returned to Singapore. I accept Mr. Cashin's plea that there was no intention on the part of Tan to prejudice the interest of the State in any way, and no prejudice had been caused. Substantially, the contents of the documents were already known to those informed of current events and could hardly be of any assistance to anyone engaged in trading in currencies. Having regard to all these facts including those considered by the learned judge I am not disposed to disturb the nominal term of 1 day imprisonment imposed by the learned judge for each of the charges. As for the other component – the fine of $750, however, I cannot let it pass. I therefore increase it to $1,500 for each of the charges, and in default of payment, I impose a term of one month imprisonment.

I now turn to the appeal by the Public Prosecutor against the acquittal of Phua. Phua was charged with having committed an offence under section 5(2) of the Act, in that he received a copy of the Information Note No. 133/83 (exhibit P9), knowing at the time he received it, that it was communicated to him in contravention of the Act, section 5(2) of the Act is as follows:

> "5.-(2) If any person receives any secret official code word, countersign or password, or any photograph, drawing, plan, model, article, note, document or information knowing, or having reasonable ground to believe, at the time when he receives it, that the code word, countersign, password, photograph, drawing, plan, model, article, note, document or information is communicated to him in contravention of this Act, he shall be guilty of an offence under this Act, unless he proves that the communication to him of the code word, countersign, password, photograph, drawing, plan, model, article, note, document or information was, contrary to his desire."

Mens rea is a necessary ingredient of this offence and to sustain the charge the prosecution must prove:

(a) that Phua received a copy of the Information Note, exhibit P9, and

(b) that at the time of receipt, Phua knew, or had reasonable ground to believe, that P9 was sent to him in contravention of the Act.

Once these facts have been established, it is then for Phua to prove that P9 was communicated to him contrary to his desire. The fact that Phua received it is not in dispute; this was admitted by Phua himself. The crucial issue is whether at the time he received P9 he knew or had reasonable ground to believe that it was sent to him in contravention of the Act. Phua admitted, and the learned judge found, that at the time when Phua received P9 from Tan, Phua knew that Tan had obtained it in his official capacity, and that P9 was distinctly marked "Confidential". Having found this the learned judge then posed the following questions:

"Did he however know, or have reasonable ground to believe, that it had been communicated to him in contravention of the Act? More specifically, did he know or have reasonable ground to believe that the only persons authorised to receive it were those in List B to D of the Distribution List?"

The first question is of course relevant – that was the issue before him, but the second question, with respect, is both unwarranted and irrelevant. It is unwarranted because an answer in the affirmative to the first question, which is an ingredient of the charge, does not necessarily entail a similar answer to the second question. It is irrelevant because it matters not whether Phua knew or had reasonable ground to believe that only persons authorised to receive it were those in Lists B to D of the Distribution List. Plainly, until the evidence emerged at the trial, Phua was in no way in a position to know that; he was not working in the Ministry of Foreign Affairs and could hardly be expected to know that such lists existed. The learned judge found that Phua did not know that only persons in Lists B to D of the Distribution list were authorised to receive P9; he said:

"The copy of the Information Note (P9) that was sent to him, apart from being stamped "Confidential" itself did not contain any indication that its circulation was confined only to those in the Distribution List."

What is relevant is not whether Phua knew that the circulation of P9 was confined to those in the Distribution List but whether he knew or had reasonable ground to believe that communication of P9 to him was unauthorised. The learned judge accepted Phua's evidence that in Phua's experience Government officers always "overclassify" the documents; the word "confidential" does not carry the normal meaning; when he received and read P9 he knew more than what was contained in it, and he thought that it was one of those "confidential" documents in an "overclassified category". This seems to me to be a piece of *ex post facto* rationalisation by Phua. At any rate it seems to me that if that was what he recalled at the time when he read P9 he must have recalled also that in Government departments classified or even overclassified documents were meant for circulation or distribution to persons authorised to receive them and that category of persons obviously did not include him.

I agree that knowledge or reasonable ground of belief on the part of Phua must be actual knowledge and belief: see *London Computator, Ltd.* v. *Seymour,*[7] *Taylor's Central Garages (Exeter) Ltd.* v. *Roper*[8] per Delvin J. and *R.* v. *Banks.*[9] However, in this case, like in many others, proof of knowledge or belief on the part of an accused is a matter of inference from the facts. In the case of *R.C.A. Corporation* v. *Custom Cleared Sales Pty. Ltd.*,[10] the Court of Appeal in New South Wales in dealing with the question of knowledge of infringement of copyright said, at p. 478:

"Except where a party's own statements or gestures are relied upon, proof of knowledge is always a matter of inference, and the material from which the inference of the existence of actual knowledge can be inferred varies infinitely from case to case."

And the Court further said, at p. 579:

"It seems to us that the principle is more accurately put by saying that a court is entitled to infer knowledge on the part of a particular person on the assumption that such a person has the ordinary understanding expected of persons in his line of business, unless by his or other evidence it is convinced otherwise. In other words, the true position is that the court is not concerned with the knowledge of a reasonable man but is concerned with reasonable inferences to be drawn from a concrete situation as disclosed in the evidence as it affects the particular person whose knowledge is in issue. In inferring knowledge, a court is entitled to approach the matter in two stages; where opportunities for knowledge on the part of the particular person are proved and there is nothing to indicate that there are obstacles to the particular person acquiring the relevant knowledge, there is some evidence from which the court can conclude that such person has knowledge."

What then are the facts before the Court? At the time when Phua received P9 he knew that Tan had obtained it in his official capacity, and P9 was distinctly marked "Confidential". Phua had been in the Government service for about three years, holding a senior position at the time when he left the service. He knew of classification of documents

in Government departments; he knew of official secret undertakings, as he had signed one himself when he was in service. It must have been obvious to him that documents classified as "Confidential" whether or not overclassified are not meant for circulation and distribution freely to all and sundry; he knew that such documents were meant for certain groups of persons authorised to receive them and he was not one such person. That document, P9, was sent to him by Tan not in connection with any official business with the Ministry of Foreign Affairs; it was sent to him on a personal and private basis. It must have been clear to him then that he was not a person to whom such a document was authorised to be sent. On the basis of all these facts the proper inference to be drawn is that Phua, who is a well-informed person, knew or had reasonable ground to believe at the time he received P9 that he was not authorised to receive it. In my judgment, the ingredients of the charge have been proved.

The next question is whether P9 was communicated to Phua contrary to his desire. The burden is on Phua to discharge and that he must prove on the balance of probabilities. On this issue the learned judge said:

"Even if it could be said for a moment, that it was possible on the evidence to infer that the second accused either knew or had reasonable ground so to believe, the evidence did not suggest that he had asked of the first accused for the Information Note in question.

The claim by the defence that during the several weeks prior to the despatch of the documents to the second accused, he had been abroad in Europe, that he had not asked for them or had known that they had been sent to him prior to their being sent, was not disputed by the prosecution.

"I never indicate in any way to Frederick that he should feed me with information. If at all it should be the other way round" he claimed, explaining that since one of his main jobs in Philips was to buy and sell foreign currency, "timing was essential" and information which he obtained three weeks later would have been of no use to him.

And to further substantiate his defence, he produced a contract evidencing his purchase of 100 million yen on September 26, 1983 "without the knowledge of Frederick Tan", six weeks before the Information Note had been despatched to him."

I agree that all these facts are relevant in relation to his finding that Phua did not desire that P9 should be sent to him. However, in considering this issue, it appears that the learned judge had omitted to take into account prior events leading to the despatch of P9 to Phua. In July 1983 after Phua had purchased a substantial amount of Hong Kong dollars he asked Tan for certain information indeed he even asked Tan to verify a source of information on the Hong Kong situation, which Tan did. Further, Tan at Phua's suggestion had ventured into a currency speculation in July and suffered a heavy loss in September 1983. In respect of such loss Phua had consoled Tan and advised him to focus on two coming events: results of the trial of Tanaka and President Reagan's re-election, which according to Phua would have effect on currency movements in the foreign exchange markets. In his statement (exhibit P16) which he gave to the officer of ISD soon after his arrest, Tan said:

"After we closed the deal on the HK dollar on 24 or 25 Sep 83, I continued to maintain contacts with Phua. He advised me not to feel depressed over the loss and that one could be able to make up for it through other transactions. In this context, he mentioned two events in the next 12 months which we should focus upon. These were the Tanaka court verdict and President Reagan seeking re-election. He said that these were political events which could have effects on the movements of their respective currencies and therefore I was in a better position to judge these trends. I agreed to keep track of development in the two stated areas. My main intention here was to be able to cover my losses arising from the HK dollar."

Viewed against such backdrop of events Phua can hardly maintain that the communication of P9 to him was contrary to his desire; these events at least cast very serious doubts on his assertion that he did not desire to have P9. It may well be that he did not specifically ask for P9; that he found that the information in P9 was stale and was of no use to him, and that consequently he used P9 as scrap paper. But the crucial point is: was the communication of P9 to him contrary to his desire. I am inclined to agree with Mr. Neighbour's submission that communication of P9 to Phua was not contrary to his desire, but having received it, he found it was of no use to him and treated it as scrap paper. In my judgment, on the balance of probabilities Phua has not proved the contraries of his desire.

In the result, I find that the charge against Phua has been proved. I set aside the order of the learned judge and convict Phua of the charge.

On the question of sentence, taking into consideration all the relevant circumstances, the appropriate sentence to be passed on Phua is a fine of $1,500, and in default of payment, 1 month's imprisonment.

Order accordingly.

Solicitors: *Murphy & Dunbar.*